

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000782

02/07/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

BRUCE R OWENS

v.

ANDREA MARIE BENJAMIN

MICHAEL J SMITH

FINANCIAL SERVICES-CCC
GILBERT CITY COURT
REMAND DESK CR-CCC

HIGHER COURT RULING / REMAND

GILBERT CITY COURT

Cit. No. #69835

Charge: D. DRIVING UNDER THE INFLUENCE OF ALCOHOL

DOB: 01/22/71

DOC: 06/18/00

This Court has jurisdiction of this misdemeanor criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been pending receipt of a supplemental record ordered from the Gilbert City Court. This Court has received that supplemental record which contains the trial judge's October 8, 2001 ruling denying Appellant's Motion for New Trial. This Court has received and considered the record from the Gilbert City Court, the Memoranda submitted by counsel, and the exhibits made of record.

SUPERIOR COURT OF ARIZONA
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Appellant, Andrea Marie Benjamin, was charged on June 18, 2000 within the City of Gilbert with the following offenses: (1) Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); (2) Driving with a Alcohol Concentration in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); (3) Improper Left Turn, a civil traffic violation in violation of A.R.S. Section 28-751.2; (4) Speed Greater than Reasonable and Prudent, a civil traffic violation in violation of A.R.S. Section 28-701(A); and (5) Driving in a Bike Lane, a civil traffic violation in violation of A.R.S. Section 28-815(D). Appellant entered Not Guilty pleas to these charges and her case proceeded to trial on the misdemeanor offenses before a jury. Appellant was found guilty on both misdemeanor charges (Counts 1 and 2). At the conclusion of the trial, Appellant's counsel filed a Motion to Vacate Judgment based upon an erroneous instruction given by the trial judge to the jurors advising the jury in a legally incorrect manner as to the nature of the meaning of the phrase "at the time" as it pertained to the legal presumptions of intoxication, as applied to Count 1. The trial court granted Appellant's Motion and vacated the guilty verdict as to Count 1. Appellant now contends that the trial judge erred in failing to vacate the judgment as to both charges.

Admittedly, the trial judge erred and did his best to correct that error by vacating the jury's verdict on Count 1. Appellant contends that because counsel argued the presumptions instruction, the court's incorrect explanation of those presumptions instruction "caused the defense to lose all credibility with the jury since the defense advised them of the opposite in closing argument."¹ Appellant also contends that "given the intertwined nature of the A1 and A2 charges in DUI cases, it is impossible that detrimental mis-instruction on one count will not have an impact on the other count."² Appellant's last argument must fail as the presumptions contained within A.R.S. Section 28-1381(G) clearly only apply to the Driving While Under the Influence charge contained within A.R.S. Section 28-1381(A)(1). This Court will utilize a harmless error test to analyze Appellant's remaining argument.

The Arizona Supreme Court has previously defined fundamental error as an error that:

...reaches the foundation of the case or takes from the defendant a right essential to his (her) defense, or is an error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.³

And, the Arizona Supreme Court has further explained that:

...where there is substantial evidence in the record which will support the verdict and it can be said that the error did

¹ Appellant's memorandum, at page 4.

² Id.

³ *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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02/07/2003

not contribute significantly to the verdict, beyond a reasonable doubt, reversal is not required.⁴

The record in this case contains strong indicia of guilt from which this Court can conclude, beyond a reasonable doubt, that the trial judge's erroneous instruction concerning the legal presumptions that pertain to Count 1 could not have significantly contributed to the jury's verdict on Count 2.

IT IS THEREFORE ORDERED affirming the judgment and guilt and sentence imposed for the charge of Driving with an Alcohol Concentration Greater than .10, in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED remanding this matter back to the Gilbert City Court for all further and future proceedings in this case.

⁴ State v. Gallegos, 178 Ariz. 1, 11, 870 P.2d 1097, 1107, cert.denied, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289, appeal after remand, 185 Ariz. 340, 916 P.2d 1056, cert.denied, 519 U.S. 996, 117 S.Ct. 489, 136 L.Ed.2d 382 (1994), citing State v. Thomas, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981).